IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. 682.

JOEL S. COOPER,
Petitioner,

v.

C. A. PEAK et al.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Alabama.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

The opinion of the Supreme Court of Alabama is reported in 61 So. 2d 62. It was delivered August 27, 1952 (R. 269). It has not yet been officially reported. An application for a rehearing was overruled and denied November 6, 1952 (R. 278). See also **Cooper v. Peak** (June 24, 1949), 252 Ala. 384, 41 So. 2d 590.

II.

STATEMENT OF THE CASE.

In this case the Circuit Court of Elmore County, Alabama, in Equity, denied relief to the petitioner, who in the trial court was complainant in a bill of complaint wherein

he sought to redeem certain lots of land from the respondent, C. A. Peak. The redemption was in respect to two mortgages, one executed by Joel S. Cooper, Sr., the father of petitioner, to Mrs. L. T. Pearson in May, 1928, due in 1931, and transferred to J. M. Holley in 1935 (R. 149). Another mortgage to J. M Holley was executed by petitioner's father in March, 1939, due November 1, 1939, covering the property involved (R. 156). The mortgagor died intestate May 25, 1940, leaving as his heirs at law the petitioner and eight other children. There was an administration upon the mortgagor's estate, but the administrator was not made a party to this suit. J. M. Holley, the mortgagee, died in July, 1941, without foreclosing the mortgages. On December 8, 1941, the mortgages were transferred to respondent Peak by Holley's executors under the power contained in his will. Peak began proceedings to foreclose the mortgages under a power of sale contained therein. Pending such proceedings the petitioner entered the military service on January 15, 1942. A few days thereafter, on January 26, 1942, respondent Peak concluded the foreclosure of the mortgages under the power and at the sale became the purchaser, being so authorized under the terms of the mortgages. Petitioner remained in the military service until December 19, 1945, when he was discharged. Respondent Peak entered the military service in 1944 and was discharged in January, 1946.

Early in January, 1946, after Peak and the petitioner had been released from the military service, Peak informed the petitioner of his plan to improve the property and offered him an opportunity to purchase it, or a part of it, if he so desired. The petitioner declined, according to one aspect of the evidence (R. 202). He made no claim to the property at that time (R. 202). Thereupon, beginning in February, 1946, the respondent, Peak, proceeded to expend some $20,000 in making valuable improvements upon the property. There was evidence tending to show that the peti-

tioner knew that Peak was making the improvements, that Peak was claiming to be the owner of the property, and that petitioner made no protest and asserted no claim. The improvements consisted of a brick house, a frame house, and a garage apartment. The work proceeded into the month of June, 1946. There was evidence that during that period of time Johnnie Cooper, brother of the petitioner, one of the heirs of the mortgagor, had bargained with Peak for one of the lots, and that during that period of time the petitioner and his sister occasionally passed by the property and were fully aware of the fact that the improvements were being constructed, and made no claim of ownership whatever until the latter part of June, 1946, when Peak received a letter from petitioner's attorney. At that time the brick home was practically completed, and the other buildings had already been completed.

In July, 1946, respondent, Peak, sold a portion of Lots 73 and 74 to Johnnie Cooper, above mentioned, a brother of petitioner (R. 208). In connection with the sale, Peak, having received the letter above mentioned from the petitioner's attorney in the latter part of June, 1946, obtained a deed from Johnnie Cooper conveying any interest he might have in the remainder of the property here involved (R. 211).

On October 16, 1946, the petitioner filed this suit in equity seeking to exercise the equity of redemption in respect to Lot 75, upon which no improvements had been erected. He made the other eight heirs of the deceased mortgagor, including the said Johnnie Cooper, respondents in the suit along with Peak (R. 2). The other eight heirs filed a joint answer admitting the allegations of the bill and joining in the prayer. The theory of the petitioner's case was that the sale was not valid under the Soldiers and Sailors Civil Relief Act of October 17, 1940. Respondent Peak filed a demurrer and answer to the bill.

The demurrer was sustained and petitioner filed an amendment, to which the demurrer was again sustained. On appeal from the latter ruling, the Supreme Court of Alabama affirmed the decree of the trial court. **Cooper v. Peak** (June 23, 1949), 252 Ala. 384, 41 So. 2d 590.

Thereupon the petitioner filed a substituted bill in which he sought to redeem not only Lot 75, which was the only one included in the original bill, but additional Lots 66 to 74, both inclusive, all of which were embraced in the said mortgages. The same basis for relief was contained in the substituted bill. The petitioner sought to exercise the equity of redemption as to all the property by paying the balance of the mortgage debt remaining unpaid, but **not** the cost or value of the improvements; and he sought to obtain the shares inherited by all the co-tenants, although, as has been stated, Peak, in July, 1946, had sold one of the lots to Johnnie Cooper, one of the heirs, and had obtained a deed from him conveying any interest that he might claim in the remainder of the property, and although the mortgages had been effectually foreclosed as to all the heirs other than the petitioner (and as to him also unless prevented by the Soldiers and Sailors Civil Relief Act). There was a demurrer and answer to the bill as so amended, and also a cross-bill by respondent, Peak, claiming that the petitioner was estopped to maintain his claim for redemption. There was no ruling of the court on the demurrer to the bill as last amended, but the cause was set down for hearing on the issues of fact and upon the testimony taken orally before the trial judge, who found the facts in favor of respondent, Peak, and denied relief to petitioner and dismissed the bill. Upon appeal, the Supreme Court of Alabama affirmed the decree of the trial court. **Cooper v. Peak** (August 27, 1952), 61 So. 2d 62.

III.

ARGUMENT.

No Substantial Federal Question Is Involved.

The decree of the Supreme Court of Alabama here sought to be reviewed rests upon non-federal grounds broad enough to support it and therefore a writ of certiorari should not be granted.

Utley v. St. Petersburg (1934), 292 U. S. 106;
Enterprise Irrig. Dist. v. Farmers Mut. Canal Co. (1917), 243 U. S. 157;
Stembridge v. State of Georgia (1952), 343 U. S. 541.

It is clear that the decision of the Supreme Court of Alabama does not rest upon any right afforded to the petitioner by the Soldiers and Sailors Civil Relief Act of October 17, 1940. In referring to the question whether that Act was applicable, the Court said:

> "But we do not find it necessary to construe the Act of Congress for the purposes of this case. For argument, we will assume that it does apply and that appellant's (petitioner's) equity of redemption was not cut off" (R. 273).
>
> * * * * * * *
>
> "If the Act of Congress has application to the instant transaction, it is hardly necessary to enlarge upon the theory that such invalidity would benefit only the soldier. The rights of tenants in common are several and not joint. Each cotenant has a several interest, subject to devolution as if it were not in common. **Glass v. Cook**, 57 So. 2d 505; **Ruffin v. Crowell**, 253 Ala. 653, 46 So. 2d 218. We have therefore treated the effect of the Act as applicable to complainant and not his brothers and sisters, if applicable here at all" (R. 276).

The decree of the Supreme Court of Alabama decided only these points:

(a) Under the law of evidence proof sought to be introduced by the petitioner on the trial to show that there was a parol agreement between the mortgagor and mortgagee to extend the maturity date of the mortgages was inadmissible because such a parol agreement would have had the effect to contradict the terms of the mortgages and was subject to the rule which prohibits that to be done (R. 276).

(b) It is a rule of property in Alabama that a tenant in common of property subject to a mortgage who seeks to exercise the equity of redemption must, if required by the mortgagee, redeem all the interests owned in the property and pay the entire mortgage debt.

(c) Under the law of real property in Alabama the petitioner (assuming that because of the Soldiers and Sailors Civil Relief Act of October 17, 1940, his equity of redemption had not been foreclosed) might, by redeeming his undivided one-ninth interest, stand as a co-tenant with the respondent, Peak, and be subject to the legal principles applicable when one tenant in common in good faith makes permanent improvements upon the property (R. 275).

(d) The petitioner was not entitled to any relief upon the principle of estoppel because the decree of the trial court was sustainable upon the theory that the petitioner by his conduct was estopped from setting up his claim. The Court said:

> "There is another and cogent reason why relief must be denied to the complainant, and that is based upon the principle of estoppel. It is contended by the defendant that after the complainant and he both had been released from the Army service the defendant advised the complainant of his plan to improve the property and gave him an opportunity to purchase it or any part of it if he desired. This complainant declined, according to one aspect of the evidence.

Thereupon the defendant proceeded to expend some $20,000.00 in making valuable improvements upon the property. One aspect of the evidence tends to show that the complainant knew the defendant was making the improvements and that defendant was claiming to be the owner of the property and made no protest.

"This case was tried on oral testimony taken before the trial judge who denied relief to the complainant. It could have been based upon a finding favorable to the defendant on that contention. If so, the complainant should be estopped from setting up his claim" (R. 275).

In both the **Utley** case, supra, and the **Enterprise Irrigation District** case, supra, this Court held that it did not have jurisdiction because the decrees of the state courts there involved rested upon estoppel, a non-federal ground broad enough to support them. Upon the same principle this Court does not have jurisdiction to review the decree of the Supreme Court of Alabama.

CONCLUSION.

Since the Supreme Court of Alabama has not decided a Federal question of substance in this case, the writ of certiorari should not be granted.

Respectfully submitted,

DOUGLAS ARANT,
Counsel for Respondent, C. A. Peak.

ROBERT T. MILNER,
ROBERT S. MILNER,
HOLLEY, MILNER & HOLLEY,
Wetumpka, Alabama,
WHITE, BRADLEY, ARANT, ALL & ROSE,
Birmingham, Alabama,
Of Counsel.